



1 THE CLERK: 11 CR 50062, U.S.A. v. Dayton Poke.

2 MR. PEDERSEN: Good morning, your Honor. Joe Pedersen  
3 on behalf of the United States.

4 MR. COOK: Good morning, your Honor. Frank Cook on  
5 behalf of the defendant, Dayton Poke.

6 THE COURT: Good morning.

7 DEFENDANT POKE: Good morning, your Honor.

8 THE COURT: Show Mr. Poke appears in custody.

9 The case comes before the court for a resentencing upon  
10 remand by the Seventh Circuit Court of Appeals.

11 Mr. Poke, are you taking any medications?

12 DEFENDANT POKE: Yes, sir.

13 THE COURT: What are you taking?

14 DEFENDANT POKE: Gabapentin.

15 THE COURT: That's what you were taking at the last  
16 sentencing hearing, also.

17 DEFENDANT POKE: Yes, sir.

18 THE COURT: Have you consumed any other drugs or  
19 alcohol in the past 24 hours?

20 DEFENDANT POKE: No, sir.

21 THE COURT: Is there anything about that -- did you  
22 take it this morning?

23 DEFENDANT POKE: Yes, sir.

24 THE COURT: Is there anything about -- and what's it  
25 for?

1           DEFENDANT POKE:   It's for nerve pain.

2           THE COURT:   All right.   Is there anything about that  
3 medication that affects your ability to think or reason or make  
4 decisions?

5           DEFENDANT POKE:   No, sir.

6           THE COURT:   Is there anything about that medication  
7 that affects your ability to discuss this case with your  
8 attorney?

9           DEFENDANT POKE:   No, sir.

10          THE COURT:   Is there anything about this medication  
11 that affects your ability to understand what we're doing this  
12 morning.

13          DEFENDANT POKE:   No, sir.

14          THE COURT:   Mr. Cook, is there any question in your  
15 mind that the defendant's fit to participate in this sentencing  
16 hearing?

17          MR. COOK:   I believe he is, your Honor.

18          THE COURT:   I have before me the following materials to  
19 consider.   In addition to the written materials that were used  
20 in the original sentencing hearing, which includes a one-page  
21 report from the Metropolitan Correction Center dated  
22 October 23rd, 2013, I have the following additional written  
23 materials to consider.   The defendant's Sentencing Exhibits A  
24 and B that were received at the original sentencing hearing and  
25 an exhibit which was presented by the defendant regarding the

1 gabapentin medication he was and is taking. Also a supplemental  
2 report filed by the probation office dated October 29th, 2015,  
3 which, by the way, references that October 23rd, 2013, MCC  
4 report that I mentioned.

5 This is one thing that I don't know that the parties  
6 have. It's a copy of the bond sheet that shows the defendant  
7 was released on bond the same day he was arrested for a  
8 possession with intent to deliver which occurred on July 31st,  
9 2001, in case number 01 CF 1860, which is referenced in  
10 paragraph 64 of the presentence investigation report. Do the  
11 parties have a copy of that? Mr. Pedersen?

12 MR. PEDERSEN: Your Honor, we may have a copy. I  
13 don't --

14 MR. COOK: I don't have a copy, your Honor.

15 THE COURT: All right.

16 MR. COOK: And, your Honor, if I may --

17 THE COURT: Let me do this. I'll provide you with a  
18 copy. And also the government's sentencing memorandum as to the  
19 conditions of supervised release. Mr. Cook?

20 MR. COOK: Your Honor, if I may, Mr. Poke and I have  
21 had a very limited opportunity to discuss this case, and,  
22 unfortunately, I don't believe that he and I are on the same  
23 page enough that we can proceed with the sentencing at this  
24 time.

25 Mr. Poke was -- I didn't communicate with him at all

1       until this last Monday. He returned to MCC I think a week ago  
2       today, and I was advised of that, and I made efforts to get in  
3       touch with him there and finally communicated with him  
4       telephonically on Monday in a conversation that didn't go all  
5       that well, I might add. But I was able to meet with him  
6       yesterday afternoon down in Oregon, and then I spoke with him  
7       before coming in here today.

8               There are things that he would like me to look into  
9       that I have not had an opportunity to do. And in trying to gain  
10      an understanding of this case, it has proven to be a bit more  
11      complicated than I anticipated when we were first here, and as a  
12      consequence, I believe my estimate that a month would enable me  
13      to get up to speed on this was optimistic.

14             I knew at the time I said that that one of the things  
15      that was going to be colliding with this was a deadline for  
16      getting a petition for cert on file with the Supreme Court. I  
17      managed to get that done ahead of schedule in anticipation of  
18      being able to focus in on this matter. And as circumstances  
19      have worked out, we have not had -- and I believe Mr. Poke would  
20      agree with this -- that he and I have not had a sufficient  
21      opportunity to go over these matters to the extent that we feel  
22      comfortable proceeding with the sentencing at this point.

23             THE COURT: One of the matters you should be sensitive  
24      to is the scope of remand by the Court of Appeals. I've  
25      reviewed very carefully the Seventh Circuit opinion, and I will

1 reference two cases for you, United States v. Tommy Adams,  
2 746 F.3d 734, which states, "A general remand does not entitle  
3 the defendant to present new arguments and evidence beyond that  
4 pertinent to the issues raised on appeal. While a general  
5 remand is the typical course of action, in some cases it has  
6 caused unnecessary confusion and wasted judicial resources. The  
7 confusion stems in part from the misperception that a general  
8 remand requires a district court to start from scratch. It does  
9 not. The law of the case doctrine precludes a defendant from  
10 raising an argument not raised during his first appeal."

11 I'd also reference the case of United States v.  
12 Husband, 312 F.3d 247, in which the court states, "Any issue  
13 that could have been but was not raised on appeal is waived and  
14 thus not remanded. An argument bypassed by the litigants and  
15 therefore not presented in the Court of Appeals may not be  
16 resurrected on remand and used as a reason to disregard the  
17 Court of Appeals decision. The court may explicitly remand  
18 certain issues exclusive of all others, but the same result may  
19 also be accomplished implicitly. If the opinion identifies a  
20 discrete particular error that can be corrected on remand  
21 without the need for a redetermination of other issues, the  
22 district court is limited to correcting that error."

23 I just wanted to clarify those matters for the parties.  
24 Can we do this later today?

25 MR. COOK: I would be surprised, your Honor.

1 THE COURT: Mr. Pedersen, what's your position?

2 MR. PEDERSEN: Your Honor, I guess given Mr. Cook's  
3 statements that he's indicated that he needs additional time and  
4 he hasn't had sufficient time to meet with his client, I don't  
5 think that there's any basis for us to object to their request,  
6 and what he's indicated does not seem unreasonable.

7 MR. COOK: Your Honor, if I could, so that I understand  
8 what we're talking about here in terms of the scope of the  
9 remand, in my reading of the Seventh Circuit decision, it  
10 appeared that the principal concern of Judge Posner had to do  
11 with regard to what he described, I think, as an accidental  
12 double counting that resulted in the 924(c) 60-month sentence  
13 being tacked onto what would be the career offender, the bottom  
14 end of the career offender guideline range, and then the issues  
15 with regard to the conditional release. Is that the extent of  
16 what -- is that how you're interpreting that in terms of what  
17 the issues are at this point?

18 THE COURT: Judge Posner also discussed the analysis of  
19 the 3553(a) factors, specifically deterrence, general  
20 deterrence. Those are the issues I see.

21 But my point is I think it would be inappropriate to  
22 bring up career offender designation. I think the guidelines  
23 have been resolved, probably not to the satisfaction of  
24 Mr. Poke, but I think the guideline range is settled, and it is  
25 360 months to life. But I certainly will not object to any

1 other 3553(a) factors that you and Mr. Poke believe that I  
2 should consider.

3 MR. COOK: The same is true, I would assume, with  
4 regard to the armed career offender.

5 THE COURT: Right. That's been resolved. Do you  
6 concur, Mr. Pedersen?

7 MR. PEDERSEN: I agree, your Honor. I think at the  
8 resentencing hearing, though, the court can consider all the  
9 remaining 3553(a) factors and anything that's happened between  
10 the first sentencing and now, as well.

11 THE COURT: Right. The guidelines calculations have  
12 been resolved, and we're considering all of the other 3553(a)  
13 factors on remand, I believe, with specific attention to those  
14 brought up by Judge Posner. And, actually, when I say the  
15 guidelines range has been resolved, we certainly have to address  
16 the double counting issue that concerns Judge Posner.

17 MR. COOK: But essentially we're looking at a 360-month  
18 floor as far as a guideline determination is concerned.

19 THE COURT: Right. The guidelines range is 360 months  
20 to life. Can we do this tomorrow afternoon?

21 MR. COOK: We can do it tomorrow afternoon, your Honor.

22 THE COURT: All right. Tomorrow afternoon at 1:30.

23 MR. COOK: 1:30?

24 THE COURT: Yes. We'll see you then.

25 MR. COOK: Thank you.



1           DEFENDANT POKE: Your Honor, I got a question. I want  
2 to know your opinion myself. He broke down a lot of different  
3 things. I'm just trying to get a clear understanding. He  
4 stipulated in there that for all my counts my mandatory minimum  
5 should have been 20 years to life and my drug amount should have  
6 been -- I mean, the count for one should have been zero to  
7 20 years. So, I was wondering if he stipulated that in there,  
8 how do my guidelines stay at 360 to life? I mean, in the  
9 opinion he stipulated that for all my counts --

10           THE COURT: When you say he, are you talking about  
11 Judge Posner?

12           DEFENDANT POKE: Yeah. He said for all three counts.

13           MR. COOK: I believe there was a section, your Honor,  
14 where he talked about the mandatory minimums for the felon in  
15 possession and the 924(c) would amount to 20 years.

16           THE COURT: Right.

17           DEFENDANT POKE: And for the drug amounts it should be  
18 zero to 20.

19           THE COURT: No. The maximum sentence for the drug is  
20 30 months, and that's because of the 851 notice.

21           MR. PEDERSEN: 30 years, your Honor.

22           THE COURT: Thirty years, yes, right. Sorry.

23           DEFENDANT POKE: It's because of the what?

24           THE COURT: The 851 notice.

25           MR. COOK: Prior convictions.

1           MR. PEDERSEN: But there's no mandatory minimum for the  
2 drug count. That's correct.

3           THE COURT: All right. Are we clear?

4           MR. PEDERSEN: But the guidelines are separate.  
5 They're advisory. That's 30 to life. The mandatory minimums  
6 for the other two counts, the felon in possession count and  
7 the -- or I'm sorry -- as an armed career criminal, that's  
8 15 years for that count.

9           THE COURT: For which count?

10          MR. PEDERSEN: For the --

11          THE COURT: Felon in possession?

12          MR. PEDERSEN: -- felon in possession.

13          THE COURT: Right.

14          MR. PEDERSEN: And then the 924(c) count is another  
15 five years.

16          THE COURT: Correct.

17          MR. PEDERSEN: So, that equals 20.

18          THE COURT: Right. Are we clear?

19          DEFENDANT POKE: Huh?

20          THE COURT: Are we clear?

21          DEFENDANT POKE: So, my mandatory minimum is 20 to  
22 life, not 30 to life.

23          THE COURT: The statutory minimum is 20 years.

24          DEFENDANT POKE: Right.

25          THE COURT: All right. That's it. See you tomorrow.

1           MR. PEDERSEN: One more thing, your Honor, just to make  
2       sure. You were interrupted before you went through all the  
3       materials that you received. I just want to make sure that you  
4       received the United States memorandum regarding the conditions  
5       of supervised release.

6           THE COURT: I think I mentioned that.

7           MR. COOK: Yeah, I think you did.

8           MR. PEDERSEN: Okay. I missed that. I'm sorry.

9           THE COURT: Court's in recess.

10          (Which were all the proceedings had in the above-entitled  
11       cause on the day and date aforesaid.)

12          I certify that the foregoing is a correct transcript from  
13       the record of proceedings in the above-entitled matter.

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16       /s/ Mary T. Lindbloom

17       Official Court Reporter

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